U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOSEPH GUTIERREZ, **ARB CASE NO. 99-116**

COMPLAINANT **ALJ CASE NOS. 98-ERA-19**

v. **DATE: November 8, 1999**

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
Carol Oppenheimer, Esq., *Simon, Oppenheimer & Ortiz, Santa Fe, New Mexico*

For the Respondents:
Ellen M. Castille, Esq., *Office of Laboratory Counsel/Litigation & Employment Law, Alburquerque, New Mexico*

ORDER ACCEPTING PETITION FOR REVIEW AND ESTABLISHING BRIEFING SCHEDULE

On June 9, 1999, an Administrative Law Judge ("ALJ") issued a Recommended Decision and Order ("merits decision") in this case arising under the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. §5851 (1994). The ALJ found that Respondent Regents of the University of California ("the University") violated the ERA's employee protection provisions, awarded Complainant Joe Gutierrez damages and ordered Gutierrez to submit a fully supported application for costs and expenses, including attorney fees. On August 16, 1999, the ALJ issued a Recommended Decision and Order Awarding Attorney Fees ("attorney fee decision").

A party seeking review of an ALJ's recommended decision and order is required to file a petition for review with the Administrative Review Board ("ARB") within ten business days of the date of the ALJ's recommended decision and order. 29 C.F.R. §24.8. On June 23, 1999, the University prepared a notice of appeal of the ALJ's merits decision and served it upon counsel for Gutierrez; the Assistant Secretary, Occupational Safety and Health Administration;

and the Associate Solicitor, Division of Fair Labor Standards. Rather than file its petition with the ARB, as required by §24.8; however, the University filed it, by fax within the ten-day period, but with the Department of Labor's Chief Administrative Law Judge.

On August 25, 1999, the University, when preparing a petition for review of the ALJ's August 16, 1999 attorney fee decision, realized that it had mistakenly filed its petition for review of the ALJ's merits decision with the Chief Administrative Law Judge, rather than with the ARB.

On August 26, 1999, the ARB received the University's "Petition for Review of Recommended Decision and Order Approving Attorney Fees." We docketed this appeal as ARB Case No. 99-116 and issued an order establishing a briefing schedule.

On August 30, 1999, we received the University's belated appeal of the merits decision, including: (1) "Respondent's Motion Requesting an Extension of Time for Filing of the Incorrectly Filed 'Respondent's Petition for Review'"; (2) "Affidavit of Pablo Prando"; and (3) "Respondent's Memorandum in Support of Respondent's Motion Requesting an Extension of Time for Filing of the Incorrectly Filed 'Respondent's Petition for Review.'" The University urges the ARB to accept the petition for review of the ALJ's merits decision and to consider the case. It argues that the ten-day filing period is not jurisdictional and that its timely filing with the Chief Administrative Law Judge tolled the filing deadline. Gutierrez contends that the ten-day period is jurisdictional and, in any event, we should not consider it to be tolled in this case.

The ARB recently addressed the issue whether the ten-day filing period may be tolled in *Duncan v. Sacramento Metropolitan Air Quality Management District*, ALJ Case No. 97–CAA–12, ARB Case No. 99–011, 1999 WL 702415, Order Accepting Appeal and Establishing Briefing Schedule (Sept. 1, 1999). In *Duncan,* we accepted a petition for review, which like the University's, was timely filed with the Chief Administrative Law Judge, but not with the ARB. *Id.* at 3. We noted that accepting the petition was fully consistent with the Supreme Court's decision in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970). *Id.* In *American Farm Lines*, the Court held:

> "[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

397 U.S. at 539 (*quoting NLRB v. Monsanto Chemical Co.,* 205 F.2d 763, 764 (8th Cir. 1953)). *Accord General Services Administration, Region 3*, ARB Case No. 97-052, Dec. & Ord. Nov. 21, 1997), slip op. at 4 (The ARB may waive compliance with the Secretary of Labor's regulations governing service and filing requirements "provided that such waiver did not impinge upon the ability of the respective parties to participate in th[e] appeal.").

The regulation establishing a ten-day limitations period for filing a petition for review with the ARB is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes. 29 C.F.R. §24.1. These procedural regulations do not confer important procedural benefits upon individuals or other third parties outside the agency. *Cf. City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109 (4th Cir. 1989)(FERC could not waive compliance with regulation requiring that water quality certification requests be made in compliance with state law because the regulation clearly is designed to confer a benefit upon the states by discouraging prospective licensees from thwarting state administrative procedures.). Thus, it is within the ARB's discretion, under the proper circumstances, to accept an untimely filed petition for review.

In determining the circumstances under which we will waive a procedural limitations period, we are guided by the principles of equitable tolling. *See, e.g., Duncan v. Sacramento Metropolitan Air Quality Management District*, *supra,* 1999 WL 702415 at * 1; slip op. at 2; *Backen v. Entergy Operations*, 95–ERA–46 (ARB June 7, 1996); *Gavensky v. Northeast Nuclear Energy Co.,* 93–ERA–53 (Sec'y Fin. Ord. Oct. 6, 1994). In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complaint must be filed with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. However, the court held that because Congress, not the courts or administrative agency, was entrusted with the responsibility to determine the statutory time limitations, the restrictions on equitable tolling must be "scrupulously observed." *Id.* at 19. The court recognized three principal situations where tolling is appropriate:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. at 20 (citation omitted). The court did not decide, however, whether these three categories are exclusive. *Id.*

In *Rose v. Dole*, 945 F.2d 1331 (1991), the Sixth Circuit held that a similar statutory thirty-day limitations period for filing a complaint under the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. §5851 (1988), is also subject to equitable tolling. In determining whether the employee was entitled to such tolling, the court recognized five factors that must be weighed: 1) whether the plaintiff lacked actual notice of the filing requirements; 2) whether the plaintiff lacked constructive notice of the requirements; 3) whether the plaintiff diligently pursued his rights; 4) whether the defendant's rights would be prejudiced by the tolling of the limitations period; and 5) the reasonableness of the plaintiff's ignorance of his rights. 945 F2d at 1335.

Like the court in *City of Allentown*, we too find it unnecessary to determine whether the three categories are exclusive because the University filed a timely appeal "in the wrong forum" *i.e.*, in the Office of the Chief Administrative Law Judge, rather than with the ARB. The University put Gutierrez on notice that it intended to file a petition for review with the ARB within the ten-day period provided in 29 C.F.R. § 24.8 when the University erroneously filed its petition with the Chief Administrative Law Judge. Furthermore, Gutierrez has failed to demonstrate that he was prejudiced by the University's error. This case involves neither a stale claim, nor a petitioner who has "slept on [its] rights." *See Burnett v. New York Railroad Co.,* 380 U.S. 424, 428 (1965). Consequently, the University's petition for review of the ALJ's Recommended Decision and Order of June 9, 1999 is **ACCEPTED** and consolidated with its appeal of the ALJ's Recommended Decision and Order Approving Attorney Fees, which we have docketed as ARB Case No. 99-116.

The briefing schedule previously issued in our September 3, 1999 Order is withdrawn and the following briefing schedule is established. The University may file an initial brief, not to exceed thirty (30) double-spaced typed pages addressing the merits issues and ten (10) double-spaced typed pages addressing the attorney fee issues, on or before **December 8, 1999**. Gutierrez may file a reply brief, not to exceed thirty (30) double-spaced typed pages addressing the merits issues and ten (10) double-spaced typed pages addressing the attorney fee issues, on or before **January 7, 2000.** The University may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed ten (10) double-spaced typed pages on the merits issues and five (5) double spaced typed pages on the attorney fee issues, on or before **January 21, 2000.**

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. ***See, e.g.,*** **Fed. R. Civ. P. 7(b).**

All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1¼ inch top and bottom margins, printed on 8½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted.

An original and four copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C., 20210.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member